

1 **JACKSONWHITE**
2 **ATTORNEYS AT LAW**
3 *A Professional Corporation*

4 40 North Center Street, Suite 200
5 Mesa, Arizona 85201
6 T: (480) 464-1111 F: (480) 464-5692
7 Email: centraldocket@jacksonwhitelaw.com
8 Attorneys for Debtor and Debtor in Possession HB Global, LLC
9 By: Kelly G. Black, No. 016376

10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF ARIZONA**

12 In re:

13 HB Global, LLC

14 Debtor

No. 2:11-bk-17648-RJH

Joint Pretrial Statement (Revised)

Assigned to: Honorable Randolph J. Haines

Hearing: August 31, 2011, 1:00 p.m.
(previously set for 1:30 p.m.), 230 N. First
Ave., Phoenix, AZ 85003, Courtroom # 603

15
16 Pursuant to this Court's Minute Entry Order entered on August 9, 2011, Debtor HB
17 Global, LLC ("Debtor") and MC AZ Grand Village, LLC ("MC AZ"), through their undersigned
18 counsel, submit their *Joint Pretrial Statement* for the evidentiary hearing to be held before this
19 Court on August 31, 2011, at 1:00 p.m.

20 **I. Statement of the Case**

21 Debtor leases non-residential space from MC AZ. On June 18, 2011, Debtor filed for
22 protection under Chapter 11 of the Bankruptcy Code. (Doc. # 1.) The Court previously
23 shortened the time in which Debtor may assume or reject its lease with MC AZ. (Doc 45.) The
24 current issue whether Debtor may assume its lease with MC AZ, and on what terms.

25 The Court directed the Parties to present evidence in the following areas during the
26 hearing, among other issues that may be relevant: (a) prompt cure or adequate assurance of
27 prompt cure; (b) adequate assurance of future performance; and (c) the status of the
28 contingencies in the contract with Tailgaters.

1 MC AZ asserts that Debtor cannot cure its default and that, based on Debtor's prior
2 payment history, Debtor will be unable to provide adequate assurance of future performance
3 under the Lease. MC AZ further asserts that its amended lease with its replacement tenant
4 (Tailgaters) extends the time for the contingencies in that lease to be satisfied.

5 Debtor asserts that it will be able to cure the lease. As stated in part by MC AZ, the
6 expected loan from The Advance Funding Company was denied by underwriting due to the
7 Chapter 11 case. Debtor has filed a \$113,000 claim with the Arizona Department of
8 Transportation (ADOT) for revenue loss caused by the road construction. ADOT has indicated
9 that it would respond to the claim by September 9, 2011. Debtor also continues to seek
10 alternative financing, investment or sales options.

11 Debtor further asserts that MC AZ has entered in to an amended lease with Tailgaters that
12 preserves contingencies which give Tailgaters the chance to walk away from the lease. Debtor
13 asserts that no purpose would be served by forcing Debtor to vacate the premises if it is able to
14 secure funds from any source to cure the lease payments, particularly if it succeeds before MC
15 AZ is required to deliver possession to Tailgaters. Debtor also asserts that expedited assumption
16 of the lease is neither required nor prudent if the contingencies for furniture, fixtures and
17 equipment (FF&E) in the Tailgaters lease are not removed.

18 **II. Stipulated Material Facts and Legal Conclusions**

19 **A. Facts.**

- 20 1. Debtor leases nonresidential space from MC AZ.
- 21 2. The Lease's term began on April 22, 2009.
- 22 3. The rent consists of a "Minimum Monthly Rent" and "Additional Rent,"
23 which includes insurance premiums, property and sales taxes, and common area
24 maintenance ("CAM") fees.
- 25 4. Rent is due on or before the first day of each month.
- 26 5. In November 2009, MC AZ and Debtor entered an Amendment to Lease
27 that lowered Debtor's Minimum Monthly Rent.
- 28

1 6. Debtor filed a voluntary petition for relief under Chapter 11 of the
2 Bankruptcy Code on June 18, 2011.

3 7. Debtor paid MC AZ \$6,876.83, which is the Minimum Monthly Rent for
4 July 1, 2011 by cashier's check dated June 30, 2011, sent by priority mail June 30, 2011,
5 and credited by MC AZ on July 5, 2011.

6 8. This payment did not include \$1,470 due for insurance, taxes, and CAM
7 for July 2011.

8 9. Debtor paid \$8,572.19, which equaled the Minimum Monthly Rent and
9 Additional Rent for August 2011. The check was sent by certified mail. MC AZ was
10 given notice of the delivery July 30, 2011 and credited the payment on August 3, 2011

11 10. The monthly rent, subject to changes in taxes and CAM charges, is
12 \$8,572.19.

13 ***B. Legal Conclusions.***

14 1. The Parties do not believe there are any stipulated legal conclusions.

15 **III. Contested Issues of Material Fact and Law**

16 ***A. MC AZ:***

17 1. *Contested Facts:*

18 a) Debtor has paid its rent late or incompletely for more than two
19 years.

20 b) As of August 31, 2011, Debtor is delinquent under the Lease by at
21 least \$66,356.35.

22 c) MC AZ and Tailgaters Sports Grill & Il Primo Pizza & Wings /
23 Grand Village executed a letter of intent for Tailgaters to lease the space currently
24 occupied by Debtor on or about March 14, 2011.

25 d) MC AZ and BK Enterprises, LLC d/b/a Tailgaters Sports Grill / Il
26 Primo Pizza and Wings ("Tailgaters"), entered a lease agreement on or about May
27 20, 2011.
28

1 e) Tailgaters intends to make improvements to the space currently
2 occupied by Debtor.

3 f) Tailgaters executed an amendment to the lease that extends the
4 time by which HB Global must clear the premises to September 15, 2011.

5 2. Contested Legal Issues:

6 a) HB Global bears the burden of proving that it can cure its default
7 under the lease by paying \$66,356.35.

8 b) HB Global bears the burden of proving that it can provide MC AZ
9 adequate assurance that it can pay rent going forward.

10 **B. Debtor:**

11 1. Contested Facts:

12 a) Road construction made it difficult for patrons to enter Debtor's
13 establishment in the past, and this condition has ended.

14 b) Debtor's reputation for quality food and good atmosphere has
15 spread, resulting in increasing returned customers.

16 c) Debtor has put in place controls to prevent theft of inventory,
17 waste from purchases, and employee expenses, all of which hurt Debtor in the
18 first year of operation.

19 d) Debtor has paid in full a merchant financing account which
20 required an average of approximately \$5,618.00 per month to service through
21 April 10, 2010.

22 e) Debtor's business is valuable, as evidenced by the interest
23 expressed by Tailgaters and by a more recent potential purchaser.

24 f) Debtor found Tailgaters as a potential purchaser, the representative
25 of which toured Debtor's facilities and requested further discussions about a
26 purchase of its business in January and February 2011.
27
28

1 g) Rather than cooperate in a sale of its business to Tailgaters,
2 including a cure of the past due rent, MC AZ negotiated a deal which required it
3 to evict Debtor.

4 h) To facilitate its deal with Tailgaters, MC AZ sent notice to an
5 address which it knew was no longer valid.

6 i) According to ADOT, funds have been set aside for such claims,
7 and it has paid on such claims for the same improvement project on Reems Road
8 and Grande Avenue.

9 j) Debtor further asserts that MC AZ has entered in to an amended
10 lease with Tailgaters that preserves contingencies which give Tailgaters the
11 chance to walk away from the lease.

12 2. Contested Legal Issues:

13 a) The cure period which may be considered “prompt” in the context
14 of the lease.

15 b) Whether MC AZ breached express or implied covenants of the
16 lease, including the covenant of good faith and fair dealing in its conduct with
17 Tailgaters and Debtor.

18 c) Whether MC AZ interfered with Debtor’s prospective economic
19 advantage with Tailgaters.

20 d) Whether expedited assumption of the lease should be reconsidered
21 in light of contingencies remaining in the Tailgaters lease, which the Court
22 previously recognized are relevant to the issues of assumption and cure.

23 e) Whether Debtor can cure or give adequate assurance of cure and
24 compensation.

25 f) Whether Debtor has proposed adequate assurance of future
26 performance.

1 **IV. List of Witnesses**

2 **A. MC AZ's Witnesses:**

3 None.

4 **B. Debtor's Witnesses:**

5 1. Erik D. Borgedalen

6 2. Michael A. Hoffert

7
8 **V. List of Exhibits**

9 **A. MC AZ's Exhibits**

10
11 1. Executed Letter of Intent between Tailgaters Sports Grill & Il Primo Pizza &
12 Wings / Grand Village and MC AZ Grand Village, LLC, dated March 14, 2011. [Previously
13 admitted.]

14 2. Executed Lease between MC AZ Grand Village, LLC and BK Enterprises, LLC
15 d/b/a Tailgaters Sports Grill / Il Primo Pizza and Wings, dated May 20, 2011. [Previously
16 admitted.]

17 3. General Ledger of MC AZ Grand Village, LLC for HB Global, LLC through
18 August 4, 2009. [Previously admitted.]

19 4. [Withdrawn]

20 5. Landlord's Non-Disturbance, Recognition and Consent Agreement entered
21 between MCK Partnership, LLC and MC AZ Grand Village, LLC on April 20, 2009.
22 [Previously admitted.]

23 6. Bill of Sale and Assignment Agreement entered between MCK Partnership, LLC,
24 MC AZ Grand Village, LLC, and HB Global, LLC on April 21, 2009. [Previously admitted. *See*
25 *also* Plaintiff's Exhibit 11 for a fully executed copy.]

26 7. Executed Lease between MC AZ Grand Village, LLC and HB Global, LLC, dated
27 April 22, 2009. [Previously admitted.]

1 8. Executed Amendment to Lease Agreement, dated November __, 2009.

2 [Previously admitted.]

3 9. First Lease Amendment between MC AZ Grand Village LLC and BK Enterprises,
4 LLC. [Stipulated.]

5 10. Transcript of Evidentiary Hearing on MC AZ Grand Village's Motion for an
6 Order Shortening Time for Debtor to Assume or Reject Lease or Alternatively for Adequate
7 Protection, held on August 9, 2011 at 9:45 a.m. [Stipulated.]

8 11. Bill of Sale and Assignment Agreement, dated April __, 2009. [Stipulated. *See*
9 also Plaintiff's Exhibit 6 for a partially executed copy.]

10 ***B. Debtor's Exhibits***

11
12 1. Actual gross revenues through July 2011, with gross and net projected revenues.
13 [Previously admitted.]

14 2. Certified mail tracking for August 2011 check. [Previously admitted.]

15 3. Sales and costs tracking sheet, April 2010 through July 2011. [Previously
16 admitted.]

17 4. Payment sheet from The Advance Funding Company. [Previously admitted.]

18 5. Certified check for July 2011 rent. [Stipulated.]

19 6. Correspondence with MC AZ. [Previously admitted.]

20 7. June 15, 2011 MC AZ delinquency notice. [Previously admitted.]

21 8. Sales and costs tracking sheet, August 2011.

22 9. Notice of Claim to ADOT, with accompanying pictures.

23 10. UCC Financing Statement for MCK Partnership, LLC
24
25
26
27
28

1
2 **VI. Estimated Length of Hearing**

3 The Court allotted one hour for this evidentiary hearing.

4 DATED this 31st day of August, 2011.

5 JACKSON WHITE

6
7 /s/ Kelly G. Black
8 Attorneys for Debtor and Debtor in Possession
9 HB Global, LLC
By: Kelly G. Black, No. 016376

10 POLSINELLI SHUGHART PC

11 By: /s/ Nathan J. Kunz
12 John J. Hebert
13 Philip R. Rudd
14 Nathan J. Kunz
15 CityScape
One E. Washington., Suite 1200
16 Phoenix, AZ 85004
Attorneys for MC AZ Grand Village, LLC

17 25742-001\412279.docx